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No. 85-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LONG-AIRDOX COMPANY, DIVISION OF THE MARMON GROUP, INC.,

Petitioner,

v.

MELVIN KESSLER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

Petitioner seeks a writ of certiorari from an unreported decision of the Circuit Court of Fayette County, West Virginia, to review an adverse decision in what is a simple action for liquidated damages under West Virginia's Wage Payment and Collection Act, *West Virginia Code* §21-5-1, *et seq.* It brings its petition for a writ of certiorari despite the refusal by The West Virginia Supreme Court Of Appeals, on two separate applications, to hear its appeal. The first of those appeal attempts was in 1984, after petitioner received an adverse decision on the issue of liability

for liquidated damages. At that time, petitioner did not seek review from this Court. The second such appeal attempt came after the Final Order specifying individual damages was entered by the Circuit Court of Fayette County, West Virginia. The instant petition for a writ of certiorari follows the second refusal of the West Virginia Supreme Court Of Appeals to accept petitioner's appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In its statement of the constitutional provisions, statutes and regulations involved in this case, petitioner has neglected to mention and/or reproduce several important statutes and regulations. These are the following: *West Virginia Code* §§21-5-1(c) and 21-5-10; as well as West Virginia Labor Commissioner Administrative Regulations 100-23 and 305. These missing statutes and regulations are reproduced in Appendix A to this Brief In Opposition.

STATEMENT OF THE CASE

This action was filed in September of 1980 by three individual plaintiffs on behalf of themselves and their approximately 180 co-workers who lost their jobs when the Long-Airdox plant in Oak Hill, West Virginia, permanently shut its doors. Through a multitude of motions and voluminous briefings, the petitioner successfully has delayed, and to this date prevented respondents from securing the liquidated damages which rightfully are theirs under West Virginia's Wage Payment and Collection Act, *West Virginia Code* §21-5-1, *et seq.* These statutes were

designed to protect employees from employers who, for whatever reason, fail or refuse to pay wages in a timely manner. Petitioner, during the course of those briefings, has insisted on twisting and misrepresenting both Federal and West Virginia law applicable to the case. Ironically, petitioner seeks to blame the delay caused by its actions on the state court. See, Petition For A Writ Of Certiorari, at page 22 (hereinafter the format for such references will be: Pet. ___).

I. THE UNCONTESTED FACTS.

On or about April 10, 1980, at the expiration of their previous collective bargaining agreement, the members of Local 772 of the United Auto Workers (hereinafter "Local 772" or the "union") entered into a contract strike which was designed to secure favorable terms in a new collective bargaining agreement. On July 29, 1980, during the course of what was a bitter strike, the petitioner advised Local 772 that it was closing down the Oak Hill plant, and moving the work formerly done at that plant to its Virginia operations. Immediately upon receiving notice of the shut down, Local 772 advised the petitioner that they accepted the last contract offer made by petitioner, and that they would return to work on August 4, 1980.

On Monday, August 4, 1980, upon their arrival at the plant, the members of Local 772 learned that the plant had in fact been shut down, and that they had been either terminated or laid off. The next regular payday after their layoff came on August 7, 1980, which also was at least 72 hours after the termination of employment. On August 5, 1980, during negotiations, the petitioner and Local 772 determined that

three Local 772 officials with super-seniority would be rehired to perform janitorial duties at the plant. All other employees were laid off or terminated as of at least August 1, 1980, the Friday preceding the Monday the members of Local 772 appeared and were ready for work.

On August 8, 1985, petitioner presented the president of Local 772, Ed Travis, with a list of wages owed, and expressed willingness to pay the wages owed. However, it conditioned that willingness upon a demand that Mr. Travis, who was not a plaintiff in this action, release any claims that respondents might have concerning the calculation of their wages. At no time did petitioner actually tender payment either to Mr. Travis or to any of the respondents. The wages owed consisted of a mixture of casual hours, break time and regular vacation. Break time is wages earned in lieu of an afternoon break. All but one respondent was owed money for break time. Casual hours were earned by longevity at the company. Every respondent was owed money for his casual hours upon separation from the company. By contrast, fewer than ten percent of the respondents were owed for regular vacation. Such regular vacation, as well as the break time and casual hours, was paid out of the general assets of petitioner.

Despite numerous requests by the individual respondents for the wages owed to them under the collective bargaining agreement, petitioner persisted for over thirty days in failing to pay to respondents even the amount it admitted that it owed to them. Finally, on and after September 10, 1980, petitioner paid to respondents the amount it admitted that it owed. Shortly thereafter, respondents filed this ac-

tion, for themselves and the approximately 180 additional members of Local 772 who were not rehired (the original plaintiffs included all but three of the Local 772 members previously employed by petitioner), under the West Virginia Wage Payment and Collection Act, seeking liquidated damages for the delay in payment of wages owed.

The petitioner admitted it actually owed wages to respondents by paying those wages, albeit untimely. There is no dispute that a period in excess of 30 days passed between the time the wages were due and the time they were actually paid. No facts other than those mentioned above are relevant to this case.

II. ADDITIONAL FACTS RAISED BY THE PETITIONER

Petitioner further has persisted in putting forward an additional version of the facts in this case, which respondents have not sought to rebut because they are irrelevant and immaterial.[1] Since the laundry list of facts recited by petitioner in its petition for a writ of certiorari is predominantly irrelevant, largely inaccurate, and frequently unsupportable by the record; respondents do not wish to let the petitioner's version of the facts go unchallenged before this Court. What follows, although irrelevant to the legal decisions made by Judge Summerfield, is a recitation of respondents' understanding of the additional facts which took place in connection with this matter:

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[1]This case was decided upon summary judgment, there being no material facts in issue. Very few pages of the approximately 600 page record in this matter are devoted to verified facts, the remainder being legal argument, notices, and unverified factual allegations. The Circuit Court determined that the undisputed facts were sufficient for decision.

Although petitioner had a duty to bargain over the results and effects of the shut down of the plant, it had no duty or right to bargain over the time for payment of wages it admittedly owed. Petitioner determined to play hardball with the wages owed in order to secure a favorable shut down agreement with Local 772. In fact, counsel for the petitioner was heard to say that it would not pay any wages until the issue of the pension plan had been resolved. At all times, both Local 772 and several individuals requested that petitioner pay the wages it conceded it owed to respondents.

However, petitioner consistently refused to pay respondents until such time as Mr. Travis signed documents foreclosing respondents' individual rights to grieve the size of their wages, a practice which had never been followed in the past in connection with the payment of wages. Mr. Travis rightfully refused to sign these documents, insisting that Long-Airdox pay the respondents what it conceded it owed to them.

Finally, on September 9, 1980, word leaked to petitioner that individuals were contemplating a wage claim action. On the following day, petitioner made all monies they admitted they owed available to respondents, and since that time apparently have paid all former employees according to petitioner's originally proposed rate schedules. Local 772 grieved the size of the payments, asserting that the plaintiffs should have been paid the wage rates prevailing under the new collective bargaining agreement. That grievance remains unresolved.

III. CONCLUSIONS OF THE COURT

On the basis of the uncontested facts, Judge Summerfield ruled that petitioner violated *West Virginia*

Code §21-5-4(d) by failing to pay respondents wages owed by the next regular payday after their layoff. He further concluded that the wages owed were not paid for more than thirty days following the date that they were due under the statute, and that therefore each respondent was entitled to thirty days wages as liquidated damages for the delay in payment, pursuant to *West Virginia Code* §21-5-4(e), plus statutory interest. Judge Summerfield also concluded that petitioner did not have a good faith defense since it did not timely pay the amount of wages it conceded it owed to respondents.

ARGUMENT

This Court should deny the petition for writ of certiorari in this matter because none of the reasons for granting the petition are present in this case. Some of the issues raised by petitioner have been decided recently by this Court. The other issues raised, in the clear absence of a conflict between the Circuits or state courts, are not of sufficient importance to be addressed at this time, and on this limited record.

I. THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 151, *et seq.*, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT.

Petitioners primary argument throughout this matter has been that the West Virginia Wage Payment and Collection Act is pre-empted by the National Labor Relations Act (NLRA), 29 U.S.C. §151, *et seq.* The upshot of this argument would be to deny the benefit of the Wage Payment and Collection Act to all unionized employees.

In its petition, Long-Airdox claims that the application of the Wage Payment and Collection Act interfered with its duty to bargain about the results or effects of plant shut down. See, Pet. 9-11. In arguing that the Wage Payment and Collection Act is therefore pre-empted by the National Labor Relations Act, petitioner has confused the two lines of pre-emption decisions issued by this Court, and has failed inexplicably to refer the Court to two recent decisions (one from last term) of this Court which preclude its pre-emption argument.

The most recent of these cases, *Metropolitan Life Ins. Co. v. Massachusetts,* ___U.S. ___, 105 S.Ct. 2380, ___L.Ed.2d ___(1985), is almost on all fours with the instant case. The other case, *New York Tel. Co. v. New York St. Dept of Labor,* 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979) (statute providing unemployment benefits to striking employees not pre-empted), is also very instructive where, as here, the pre-emption issue is raised in the context of *Machinists* pre-emption. See, *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Petitioner seems to rely on the line of pre-emption cases which began with *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). This line of cases calls for pre-emption of state law which regulates conduct which is arguably protected by Section 7, or arguably prohibited by Section 8, of the National Labor Relations Act. However, neither of those provisions of the NLRA are implicated by enforcement of the West Virginia Wage Payment and Collection Act under the circumstances of this case. See, *Metropolitan Life Ins.*

Co. v. Massachusetts, supra at ___, 105 S.Ct. at 2393-2395. As a result, the instant situation should be analysed under the standards of *Machinists* pre-emption.

The *Metropolitan Life* case involved circumstances analogous to those in the instant case. There, Metropolitan Life argued that a statute which required certain terms in all medical and hospital policies was pre-empted to the extent that it required those terms in insurance policies decided upon through collective bargaining. It was Metropolitan Life's position that since health benefits are a mandatory subject of bargaining, a law which interfered with the end result of that bargaining, rather than leaving the parties free to reach agreement about contract terms, must be pre-empted. 105 S.Ct. at 2395-2396. The only recent case on pre-emption decided by a unanimous Court, in *Metropolitan Life* this Court held that minimal state labor standards are not pre-empted, stating as follows:

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. Nor has Congress ever seen fit to exclude union-

ized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated health insurance coverage. Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."

It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor

> standards they disfavored." It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employers. (emphasis in original; citations omitted)
>
> 105 S.Ct. at 2397-2398.

The instant case similarly involves a state statute which creates minimal state labor standards. Instead of regulating the content of insurance policies, it provides minimal standards for the timely payment of wages owed to employees who are separated from employment. *West Virginia Code* §21-5-4 provides deadlines for payment of wages owed upon separation from employment, and liquidated damages for breach of those deadlines; *West Virginia Code* §21-5-1(c) defines the term "wages" as used in the statute; and §21-5-10 provides that the deadline provisions may not be set aside by private agreement. See also, West Virginia Labor Commissioner Administrative Regulations 100-23 and 305. These provisions apply neutrally to all employers and employees, whether unionized or not. Under the clear teachings of *Metropolitan Life*, these minimal labor standards statutes are not pre-empted by the NLRA.

On closer analysis, the West Virginia statutes in no way interfered with petitioners duty to bargain about the effects of plant shut down. Petitioner had no duty to bargain over wages admittedly owed. To the extent Local 772 sought additional payment, defendants had an obligation to pay what they agreed was owed within the time frame set by the West

Virginia Wage Payment and Collection Act, and negotiate later over any claimed additional payment due. The statute set the minimum standards below which the union would never seek payment. Petitioner should have stayed within the statute by timely paying what it conceded it owed.

It is well settled that unions can not waive rights given to employees by statutes. *Jewell Ridge Coal Corp. v. Local No. 6167, U.M.W.A.*, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1943). The decision in *Metropolitan Life* expands this rule to hold that employers and unions can not waive minimal state labor standards through the collective bargaining process. The law with respect to NLRA pre-emption in the context of this case is already crystal clear, and does not need further elucidation by this Court through the granting of the instant petition for a writ of certiorari.

II. SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT, 29 U.S.C. §185, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT, NOR DOES IT LEAD TO AN EXHAUSTION OF REMEDIES REQUIREMENT.

Throughout the proceedings in this matter, petitioner has maintained that respondents' claim under the West Virginia Wage Payment and Collection Act is pre-empted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185; and that, therefore, respondents have no cause of action since they did not exhaust the contractual grievance procedure. The effect of this position again would be to deny the benefits of the timely pay requirements of

the West Virginia Wage Payment and Collection Act to all unionized employees in the state.

The gravamen of the Complaint in the instant case was not breach of contract; and the claims raised are not common law claims for breach of contract. Rather, the Complaint was based upon a West Virginia statutory right created in addition to and separate from common law rights and federal rights under Section 301. Respondents brought this action against petitioner for failing *timely* to pay wages acknowledged to be due and owing.

The regulation of wages, and timely payment of those wages, is an area of traditional concern for the states, and such regulation is not pre-empted by Section 301. *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 937, 47 L.Ed.2d 43, 49 (1976); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 533, 99 S.Ct. 1328, 1337-1338, 59 L.Ed.2d 553, 564-565 (1979).

A significant body of case law regarding the survival of statutory rights and remedies holds that collectively bargained agreements do not supplant statutory rights. *See, Iowa Beefpackers v. Thompson*, 405 U.S. 228 (1972); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975) (both addressing wage and hour claims under the Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980) (Occupational Safety and Health Act).

Almost directly on point is the case of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court held that an indi-

vidual's statutory rights under the Fair Labor Standards Act exist separate and apart from rights created by the collective bargaining agreement; and that, therefore, such statutory rights could be vindicated without resort to the contract grievance procedure or a section 301 suit.

Petitioners' reliance on the recent case of *Allis-Chalmers Corp. v. Lueck*, ___ U.S. ___, 105 S.Ct 1904 (1985) is misplaced. That case specifically states that state statutes are not pre-empted if the state statute confers non-negotiable rights independent of the rights established by contract. 105 S.Ct. at 1911-1912. See also, that portion of *Metropolitan Life* quoted extensively above, since the same argument applies in the §301 pre-emption context as in the NLRA pre-emption context.

Petitioner would have this Court believe that this case does not involve employer-union waiver of minimal state labor standards (see, Pet. 19n.13), and that the claims of respondents depend upon an interpretation of the collective bargaining agreement between petitioner and Local 772. Both of these positions are so ridiculous that they can have been interposed only in an attempt to mislead this Court. Petitioner has admitted that it and the union had a "practice" of failing to follow the time deadlines of *West Virginia Code* §21-5-4(d) in the case of lay offs. See, Pet. 4. It is clear that these time deadlines for the payment of wages owed constitute minimal state labor standards. The petitioner and the union, through the collective bargaining agreement, attempted to waive employee rights to timely payment of wages owed upon layoff. The petitioner is here asserting its right to negotiate such a waiver.

Similarly, the petitioner is using "double-speak" when it contends that respondents' claims depend upon an interpretation of the collective bargaining agreement. In fact, the collective bargaining agreement need not even be consulted. The petitioner owed wages to the respondents when it closed its doors. See, Pet. 5-6. Those wages were not timely paid as required by the West Virginia Wage Payment and Collection Act; the next regular payday after shut down having been August 7, 1980, and the wages having not been paid until on or after September 10, 1980. To determine the liquidated damages owed to each respondent under §21-5-4(e), the Court needed only to look at the wage rate paid each employee and multiply it by the days of delay.[2] To suggest that this process involves interpreting the collective bargaining agreement strains credulity.

In the instant case, the West Virginia statute confers a non-negotiable right to timely payment of wages owed. It is also important to note that the collective bargaining agreement specifically stated that state law took precedence.[3]. Also, section 21-5-10 of the *West Virginia Code* makes it clear that the provisions of

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[2]Petitioner argues that the result was harsh (see, Pet. 4n.2, 8-9), but it is clear that it was the result intended by the West Virginia legislature. See, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 351, 102 S.Ct. 3245, 81 L.ED.2d 694 (1982).

[3]Article XXVII of the collective bargaining agreement, entitled LEGAL REGULATION, provides as follows: "Nothing in this Agreement shall require either party to act in violation of any Federal or State law or regulation. In the event that any of the provisions of this agreement shall be held in violation of any Federal or State Law or regulation, as applied to this specific agreement, such determination shall not in any way affect the remaining provisions of this Agreement."

the West Virginia Wage Payment and Collection Act cannot be waived by private agreement. Under the authority of *Allis-Chalmers*, the state minimal labor standard regarding timely payment of wages which is embodied in the West Virginia Wage Payment and Collection Act, is not pre-empted by §301 of the LMRA. 105 S.Ct. at 1912. This issue has been recently decided and the teachings are clear. There is not a conflict in the circuits or among the state courts as would make a granting of certiorari appropriate.

III. THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT, 29 U.S.C. 1001, *et seq.*, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT.

Petitioner further claims that the Employment Retirement Income Security Act (ERISA), 29 U.S.C. 1001, *et seq.*, pre-empts the West Virginia Wage Payment and Collection Act, in the context of this case. This claim, which was not raised until the latter stages of this litigation, would mean that no employee in West Virginia, whether unionized or not, would have any protection in a claim for unpaid vacation, break time, or casual hours pay.[4]

To make its argument, petitioner has tried to force its payroll practices of paying break time, casual hours and vacation pay out of its general assets into the mold of a "welfare benefit plan" under ERISA. See, Pet. 24. However, those payroll practices can not be forced into the mold. Although it is not dispositive of this issue that petitioner has never created a plan

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[4]Petitioner first raised its ERISA pre-emption claim in its motion for reconsideration, served August 1, 1983, nearly three years after this action commenced.

description, or filed annual reports or other information required by ERISA; such failures are indicative of the fact that petitioner did not consider these fringe benefits to be covered by ERISA. In any case, petitioner's position is based upon a mere surface reading of ERISA.

Petitioner's claim for ERISA pre-emption of the West Virginia Wage Payment and Collection Act has its basis in 29 U.S.C. §1144(a), which states that the provisions of ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any *employee benefit plan*. . . ." (emphasis added) The emphasized portion of this statute, "employee benefit plan," is defined by reference to ERISA and the regulations implementing and interpreting the statute. Thus, if any benefit paid by an employer to an employee is *not* "an employee benefit plan" under ERISA, state law may regulate payment of that benefit.

The Department of Labor, which administers ERISA, has interpreted ERISA with respect to some common fringe benefits. The relevant portions of its regulation provides as follows:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for

> medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take take vacations at a time favorable to the employer for business reasons,
>
> . . . .

29 C.F.R. §2510.3-1(b).

The reported federal decisions, decided in 1985, have built upon the regulations and held that vacation benefits are outside ERISA's coverage. See, *California Hosp. Ass'n, et al. v. Henning*, 770 F.2d 856 (9th Cir. 1985), and *Nat. Metalcrafters, A Div. of Keystone v. McNeil*, 602 F.Supp. 232 (N.D.Ill. 1985)

In *California Hosp. Ass'n, supra*, the Ninth Circuit found that a California statute regulating the payment of vacation benefits was *not* pre-empted by ERISA, basing its decision on 29 C.F.R. §2510.3-1(b). The Ninth Circuit went on to find the regulation to be a reasonable construction of ERISA, holding it to be a controlling construction of ERISA under the doctrine of *Chevron U.S.A. Inc. v. National Resources Defense Council*, ___ U.S. ___, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In *Nat. Metalcrafters, supra*, the District Court refused to enjoin the Illinois Department of Labor from enforcing the Illinois Wage Payment and Collection Act against an employer who had failed to pay vacation benefits, holding that ERISA did not apply to a vacation fringe benefit where there was no assets, no fund, and no trust to be protected.

In order to create confusion and an apparent conflict among the circuits, petitioner has cited to the cases of *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). However, these cases are inapposite since they concern severance pay plans. Interestingly enough, both *Holland* and *Gilbert* analyse 29 C.F.R. §2510.3-1(b) to see if severance plans should be excluded from ERISA coverage. Those courts correctly ruled that the severance plans under consideration were covered by ERISA, and that therefore state regulation was preempted.

In consequence, it appears that there is not a conflict in the circuits with respect to ERISA pre-emption. All the courts which have considered severance pay plans have found them to be covered by ERISA. See also, *Scott v. Gulf Oil Corporation*, 754 F.2d 1499 (9th Cir. 1985); *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985); *Jung v. FMC Corporation*, 755 F.2d 708 (9th Cir. 1985). Similarly, all the courts which have considered vacation pay taken out of general assets have found them not covered by ERISA. There is no confusion and no conflict among the circuits and the state courts.

State courts have reached similar conclusions regarding ERISA preemption. *See, Mountain States Tel. & Tel. v. Com'r of Labor*, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980); *Minnesota Mining & Mfg. Co. v. State*, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041, 100 S.Ct. 725, 62 L.Ed.2d 726 (1980); *Mass. Elec. v. Mass. Com'n Against Discrim.*, 375 N.E.2d 1192 (Mass. 1978); *Attorney General v. Trav-*

elers Ins. Co., 385 Mass. 598, 433 N.E.2d 1223 (1982), *judgment vacated*, 103 S.Ct. 3563 (1983), *aff'd*, 391 Mass. 730, 463 N.E.2d 548 (1984), *aff'd*, 105 S.Ct. 2380 (1985). Although these cases were not in the context of a Wage Payment action, their analyses are invaluable. There can be no doubt but that Judge Summerfield correctly decided that ERISA does not pre-empt the West Virginia Wage Payment and Collection Act.

CONCLUSION.

As outlined above, Judge Summerfield has rendered a correct decision on each of the issues claimed by petitioner to have been decided in error. This Court should deny the petition for a writ of certiorari in this case, so that this case can finally be put to rest and the respondents, many of whom were and are in dire straits financially, can finally receive their statutory damages for the hardship they underwent as a result of the petitioner's failure timely to pay wages owed.

Respectfully submitted,

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APPENDIX

APPENDIX A

West Virginia Code §21-5-1(c):

The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. (1980 version).

West Virginia Code §21-5-10:

Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void.

West Virginia Commissioner of Labor Administrative Regulation 100-23:

WAGES means all compensation, whether regular wages or fringe benefits, for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation.

West Virginia Commissioner of Labor Administrative Regulation 305:

AGREEMENTS CONTRA TO THIS REGULATION VOID. It shall be unlawful for any employer or railroad company to enter into or make any agreement with any employee for the payment of any such employee otherwise than as provided in this Regulation, except to pay such wages at shorter intervals than herein provided. Every agreement made in violation of this regulation shall be deemed to be null and void.